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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
11/130,877	05/17/2005	Yann-Per Lee	8012DC	3766

27752 7590 01/26/2017  
THE PROCTER & GAMBLE COMPANY  
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CINCINNATI, OH 45202

EXAMINER
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VARGOT, MATHIEU D

ART UNIT	PAPER NUMBER
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1742

NOTIFICATION DATE	DELIVERY MODE
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01/26/2017

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* YANN-PER LEE, SAEED FERESTEHKHOUE,  
and KEITH J. STONE

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Appeal 2015-001521  
Application 11/130,877  
Technology Center 1700

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Before CHUNG K. PAK, TERRY J. OWENS, and JENNIFER R. GUPTA,  
*Administrative Patent Judges.*

OWENS, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 32, 34, and 35. We have jurisdiction under 35 U.S.C. § 6(b).

*The Invention*

The Appellants claim a method for making an apertured polymeric film-based web. Claim 32 is illustrative:

32. A method for making an apertured polymeric film-based web for use as an absorbent article topsheet, said method comprising the steps of:

- a. providing a vacuum forming structure comprising a plurality of perforations, a first side and an opposing second side;
- b. extruding a resinous melt onto the first side of the perforated vacuum forming structure;
- c. providing a vacuum on the second side of the perforated vacuum forming structure so that portions of the resinous melt are drawn into the plurality of perforations to form a film having a first plurality of apertures having a first diameter and a height extending from a first surface of the film;
- d. thereafter contacting the film having a first plurality of apertures with needles or heatable pins to define a second plurality of apertures having a second diameter that is greater than the first diameter, wherein discrete needles or pins associated with this step enables the first plurality of apertures in areas not impacted by the discrete needles/pins to remain substantially unaltered relative to their as-made state;
- e. wherein the first surface of the film defines a wearer-contacting surface of the web, and wherein the first surface of the film is hydrophilic;
- f. wherein sidewalls of the second plurality of apertures extend in a direction away from the wearer-contacting surface.

### *The Rejections*

Claims 32, 34, and 35 stand rejected under 35 U.S.C. § 103 over the Appellants' admitted prior art and provisionally on the ground of nonstatutory obviousness-type double patenting over claim 17 of copending Application No. 12/193,325.<sup>1</sup>

### OPINION

We reverse the rejection under 35 U.S.C. § 103 and affirm the provisional obviousness-type double patenting rejection.

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<sup>1</sup> For the Appellants' admitted prior art the Examiner cites to the Appellants' Patent Application Publication US 2005/0214506 A1 (Sep. 29, 2005) (Ans. 2). For consistency we likewise do so.

*Rejection under 35 U.S.C. § 103*

We need address only the sole independent claim, i.e., claim 32. That claim requires forming apertures in a polymeric film first by vacuum forming and then by discrete needles/pins.

The Appellants acknowledge that the prior art includes a method wherein three dimensional surface structures (apertures 300) and fluid transport apertures (310) are formed in a polymeric film by a double-hydroforming process (¶ 50; Fig. 3) and that it was known in the art to form apertures by vacuum forming and by mechanical methods including heated needles and heated pins (¶¶ 81–82, 91).

The Examiner finds that the Appellants admit that the known aperture-forming methods are functional equivalents (Ans. 3–4, 6–9).

The Examiner does not point out any portion of the Appellants' Specification which supports that finding, and the Appellants challenge the finding (Reply Br. 3). Accordingly, we do not accept the finding as fact. *See In re Kunzmann*, 326 F.2d 424, 425 n.3 (CCPA 1964). Consequently, the Examiner's conclusion based on the finding, i.e., that "[i]t would have been obvious to one of ordinary skill in the art at the time invention to have modified the double hydroforming process of the admitted prior art that forms the article in instant Figure 3 with the well-known aperture forming methods also taught in the prior art as disclosed in instant paragraphs 0080-0082, 0089 and 0091 since they are known to be functionally equivalent" (Ans. 4), is not well taken.

The Examiner finds that "there are a limited number of methods by which the three dimensional patterning/microaperturing and forming of larger diameter fluid transport apertures are conventionally made" (Ans. 4),

and based on that finding concludes that “it would have been obvious to one of ordinary skill in the art to pick and choose suitable methods based on availability and convenience” (*id.*).

The Examiner does not point to support in the Appellants’ admitted prior art for that conclusion. In the Appellants’ admitted prior art relied upon by the Examiner, both the three dimensional surface structures and the fluid transport apertures are formed by the same method (hydroforming) (¶ 50). The Examiner does not establish that the prior art discloses or would have suggested, to one of ordinary skill in the art, use of different aperture forming methods in sequence.

Thus, the record indicates that the rejection is based upon impermissible hindsight in view of the Appellants’ disclosure. *See In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967) (“A rejection based on section 103 clearly must rest on a factual basis, and these facts must be interpreted without hindsight reconstruction of the invention from the prior art”). Accordingly, we reverse the rejection under 35 U.S.C. § 103.

*Provisional obviousness-type double patenting rejection*

The Appellants do not challenge the provisional obviousness-type double patenting rejection (App. Br. 2). We therefore summarily affirm that rejection.

DECISION/ORDER

The rejection of claims 32, 34, and 35 under 35 U.S.C. § 103 over the Appellants’ admitted prior art is reversed. The rejection of claims 32, 34, and 35 provisionally on the ground of nonstatutory obviousness-type double patenting over claim 17 of copending Application No. 12/193,325 is affirmed.

Appeal 2015-001521  
Application 11/130,877

It is ordered that the Examiner's decision is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED